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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROBERT M. BERRY REALTY, INC., Plaintiff and Appellant, v. S & A FRESHMAN FAMILY PROPERTIES, Defendant and Respondent.	B174813 (Los Angeles County Super. Ct. No. SC076083)

APPEAL from an order of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Affirmed.

Cron, Israels & Stark, Edward C. Stark, Andrew O. Smith, and Dana C. Reimus for Plaintiff and Appellant.

Law Offices of Paul J. Wright and Paul J. Wright for Defendant and Respondent.

This case arises out of an unsuccessful sale of real property. Appellant Robert M. Berry Realty, Inc. (the broker) claims it is entitled to a commission from respondent S & A Freshman Family Properties (the seller) even though the sale was not consummated. The trial court granted the seller's motion for summary judgment on the grounds that no contract ever was formed between the seller and Brian Sweeney (the buyer). The broker appeals that order, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

For approximately three months prior to January 2002, the seller had been discussing with the broker the sale of undeveloped land in Malibu to the buyer. On January 11, 2002, the seller faxed to the broker an authorization that he had drafted to present the property for purchase to the buyer pursuant to terms described in that document (the authorization letter). The authorization letter set forth the sale price as well as certain terms to be included in the purchase agreement, including the following: "Each party agrees to cooperate with the other in affecting a 1031 exchange providing that the cooperating parties shall be at no expense or liability."

After reviewing the authorization letter, the broker prepared a vacant land purchase agreement and joint escrow instructions (the purchase agreement) for the purchase and sale of the property. The purchase agreement contains a clause that allows the broker to collect his compensation from the seller even if the seller is in default. Also included in the purchase agreement is an attachment, identified as supplement No. 1, which contains, verbatim, the seller's wording regarding the 1031 exchange as set forth in the authorization letter.

On January 14, 2002, the buyer signed the purchase agreement and initialed each page, including supplement No. 1. The buyer also gave the broker a $50,000 check payable to Beverly Hills Escrow in accordance with the escrow instructions. After the buyer signed the purchase agreement, the broker contacted the seller, and the seller and the broker agreed to meet the next morning.

On January 15, 2002, the seller reviewed each page of the purchase agreement with the broker. At first, the seller had no problems with the purchase agreement and began initialing the contract. At some point during his review of the document, the seller stated that he "ha[d] to" or "want[ed] to add [a] supplement to it." Either while he was in the process of signing the document or immediately thereafter, he interlineated the following language onto Supplement No. 1: "See attached Supplement No. 2 which is a part hereof." The seller then left the room for several minutes and returned with a document he drafted, titled supplement No. 2. Supplement No. 2 reiterates the seller's condition that the sale "qualify for a 1031 exchange." Additionally, supplement No. 2 provides that the buyer and seller acknowledge that the current format of the sale does not qualify for a 1031 exchange and "that the transaction will have to be restructured to the mutual satisfaction of the buyer and seller before either is obligated to proceed. In the event this matter is not agreed to the written satisfaction of [the buyer] and seller within 20 days of the date hereof, escrow will be cancelled."

Following their meeting, the broker contacted the buyer and advised him of the contents of supplement No. 2. The buyer did not agree to those terms.

On January 25, 2002, the seller withdrew from the deal.

Procedural Background

On February 26, 2003, the broker initiated this action against the seller. The broker later filed a first amended complaint alleging a single cause of action for breach of contract/nonpayment of commission. Attached to the pleading is a copy of the purchase agreement as well as supplement Nos. 1 and 2.

In November 2003, the seller filed its motion for summary judgment, arguing that because the buyer refused to agree to supplement No. 2, no contract had been formed and the broker was therefore not entitled to a commission. The broker opposed, claiming that the seller had signed the purchase agreement before drafting supplement No. 2; therefore, an enforceable contract was formed and supplement No. 2 merely was an offer to amend the existing agreement.

On February 17, 2004, the trial court granted the seller's motion. The trial court found that as the seller was reviewing the purchase agreement "and initialing each page, he mentioned that he wanted to add Supplement No. 2, hand wrote in a reference to it, left the room to prepare Supplement No. 2, and then returned with it." "The evidence presented by [the broker] does not dispute the showing that [the seller] proposed a modification to the agreement at the time he was initialing and signing the remainder of it. Thereafter, [the buyer] did not agree to Supplement No. 2. There was no meeting of the minds on the contract. [The seller] offered a new term that [the buyer] did not want. However, there is no evidence to show, as [the broker] argues, that the proposed 'modification' was offered after the contract was accepted and signed by [the seller] without Supplement No. 2." Judgment was entered, and this timely appeal followed.

DISCUSSION

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In doing so, we acknowledge our obligation to affirm on any ground supported by the record. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457.)

II. *The Trial Court Properly Granted the Seller's Motion for Summary Judgment*

On appeal, the broker raises two primary arguments in support of its contention that the trial court erred. First, the broker challenges the trial court's finding that the buyer did not sign the contract. Second, the broker takes issue with the trial court's finding that no contract was formed because the broker failed to present evidence that supplement No. 2 was prepared after the seller executed the contract. We need not reach the merits of either theory. Regardless of whether the buyer sufficiently signed the contract and regardless of whether the seller signed the purchase agreement and supplement No. 1 before finalizing supplement No. 2, the evidence indisputably

establishes that the seller's unqualified acceptance was never communicated to the buyer or his agent.

"It is fundamental that without consent of the parties, which must be mutual (Civ. Code, § 1565), no contract can exist (Civ. Code, § 1550). Consent cannot be mutual unless all parties agree upon the same thing in the same sense (Civ. Code, § 1580)." (*Apablasa v. Merritt & Co.* (1959) 176 Cal.App.2d 719, 726.)

"Mutual assent usually is manifested by an offer *communicated* to the offeree and an acceptance *communicated* to the offeror." (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270-271, italics added; see also Civ. Code, § 1581; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 491 ["It is, according to a hackneyed expression, hornbook law that an acceptance of an offer must be communicated to the offeror to become effective"]; *Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114.) Likewise, an offeree's unqualified acceptance may be communicated to an agent to manifest mutual assent. (Civ. Code, § 1626 ["A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent"].)

Here, the evidence unequivocally establishes that the seller's alleged unqualified acceptance never was conveyed to the buyer or the broker, as the buyer's agent. The broker testified that while the seller initially was satisfied with the purchase agreement, he then commented that he needed to add a supplement. Either at the time he was signing the document or immediately thereafter, he interlineated on supplement No. 1 a reference to supplement No. 2, which the seller then promptly left the room to draft. The purchase agreement then sat on the table while the broker waited for the seller to prepare supplement No. 2; when the seller returned with supplement No. 2, the broker then put all the documents together to deliver to the buyer. The broker even admitted that as a result of the seller's comments and conduct, the purchase agreement was not finished until the seller added supplement No. 2. It follows that there was no unconditional acceptance of the buyer's offer communicated to the buyer or his agent, and, as a result, no enforceable

contract was formed. (*Drouin v. Fleetwood Enterprises, supra,* 163 Cal.App.3d at p. 491.)

Similarly, the broker's contention that a meeting of the minds did occur because the purchase agreement mirrored the terms of the authorization letter is unpersuasive. At the risk of sounding redundant, the bottom line is that the seller only made a qualified acceptance of the buyer's offer. Supplement No. 2 contained new terms, different from those already set forth in the purchase agreement and supplement No. 1 and beyond the language regarding a 1031 exchange. As such, there was no meeting of the minds and no contract was formed.

In an attempt to save his breach of contract claim, the broker relies solely upon a real estate treatise, Current Law of California Real Estate, by Harry D. Miller and Marvin B. Starr. While this treatise is often useful, we decline to rely upon it in this context and disregard the statutes and well-established case authority cited above. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1393 [a treatise is not binding law]; *Janofsky v. Garland* (1941) 42 Cal.App.2d 655, 658 [works such as "Restatement[s] of the Law do not have the force of statutory enactment nor do they supersede judicial decisions"].)

It follows that we decline the broker's request to infer from the blank counteroffer box on the purchase agreement that the seller entered into the contract and, only afterward, proposed a modification to the parties' agreement. In light of the undisputed evidence that no unqualified acceptance was communicated to the buyer, we cannot reasonably draw such an inference. (Code Civ. Proc., § 437c, subd. (c); *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

Finally, for the first time in its reply brief, the broker argues that because the seller unreasonably and arbitrarily rejected the buyer's offer to purchase the property, it still is entitled to a commission. This argument has been waived. Not only do we not consider arguments not made in the trial court (*People ex. rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46; Eisenberg et al., Cal. Practice Guide: Civil

Appeals and Writs (The Rutter Group 2003) ¶ 8:229, p. 8-113), it is well-settled that we do not consider arguments first raised in a reply brief. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372.)

DISPOSITION

The order granting summary judgment is affirmed. The seller is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD